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Supreme Court, U.S.
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No. 01-833

In the

Supreme Court of the United States

WILLIAM T. TSUI and TAMMY LU TSUI,

Petitioners,

versus

MARIKA TOLZ, as Trustee for PHILLIP E. SHERIDAN, and CARDINAL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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RESTATEMENT OF THE QUESTION PRESENTED

Whether this Honorable Court should review the Eleventh Circuit's *per curiam* affirmance, without opinion, of an unpublished district court order granting default on a motion to dismiss for lack of personal jurisdiction for failure to provide discovery because of the absence of the word "jurisdiction" or other similar terms in the discovery requests or subsequent Motion to Compel Discovery.

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INTRODUCTION

Petitioners seek a Writ of Certiorari of the Eleventh Circuit's per curium affirmance of the trial court's order, without opinion. The trial court entered a default sanction against Petitioners because of their failure to provide discovery as ordered and abandonment of their case while their Motion to Dismiss for lack of Personal Jurisdiction was pending. Petitioners attack the trial court's ruling as violative of the Due Process standards set forth by this Court in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* (hereinafter "*des Bauxites*"), 456 U.S. 694, 102 S.Ct. 2099 (1982).

Petitioners argue that Due Process was denied them because the discovery herein was not related to the pending issue of personal jurisdiction. However, rather than an appropriate analysis of the relevant discovery, Petitioners look only to the specific wording of the pleadings, discovery, and the subsequent Motion to Compel to show the discovery requested was not directly related to their pending claim of a lack of personal jurisdiction. They also ignore their knowing abandonment of their case in the District Court. In doing so, Petitioners completely disregard the substance of the discovery sought and seek to undermine and alter the clear standards set forth by this Court in *des Bauxites*. Contrary to Petitioners' assertions, the trial court's action was proper, appropriate, and in compliance with the Due Process requirements established by this Court in *des Bauxites* and was not, as claimed, in violation of Due Process.

Petitioners' assert the trial court's Rule 37 sanction of denying their pending Motion to Dismiss by default was an abuse of discretion because the documents sought did not relate to the issue of personal jurisdiction. Petitioners appropriately acknowledge that,

> "a defendant cannot challenge jurisdiction over its person and refuse to provide discovery that would shed light on the validity or invalidity of that challenge. If the defendant does so, then the assertion of jurisdiction over the defendant is a permissible sanction for failure to provide discovery relative to the jurisdictional challenge and does not violate due process."

des Bauxites, 456 U.S. at 709. In spite of Petitioners' superficial argument to the contrary, that is exactly what occurred here.

The Due Process standard as set out in *des Bauxites* also requires a court's assertion of personal jurisdiction as a default sanction for a discovery violation be "just." *des Bauxites*, 456 at 707. The trial court's action in denying the Petitioners' Motion to Dismiss as a default sanction under Rule 37 was "just" in light of the facts available to the court. As set forth in more detail below, the record clearly established that the Petitioners had not only failed to provide any discovery, but had knowingly forsaken both this case and their counsel prior to the court's granting a default. Thus, the trial court did not violate Due Process based on the information available to it at the time it entered its Order. The trial court's actions were "just" and did violate Due Process.

The Eleventh Circuit issued a per curium affirmance of the Trial Court's order without opinion. Now, Petitioners claim District Judge Gonzalez violated their right to Due Process under the Fifth Amendment and request Court grant a Writ of Certiorari. The discovery violations and abandonment of their suit by Petitioners are directly related to the sanction entered regarding the denial of their Motion to Dismiss on grounds of personal jurisdiction. The District Court acted appropriately and justly when it denied Petitioners' Motion to Dismiss and made an affirmative finding establishing personal jurisdiction as an appropriate sanction for their conduct. The Eleventh Circuit properly and

appropriately affirmed that ruling, per curium without opinion.

Moreover, Petitioners present no claim of a conflict between the Circuits sufficient to warrant this Court's issuance of the requested Writ.

ARGUMENT

Petitioners' Default Regarding Personal Jurisdiction Did Not Violate Due Process

Petitioners here appeal the June 13, 2000 Order of United States District Judge Jose A. Gonzalez, Jr. granting, in part, and denying, in part, their Motion for Reconsideration. In granting Petitioners' Motion in part, Judge Gonzalez vacated his October 29, 1999 Order in which he had granted Respondents' Motion for Clarification. He then amended his April 8, 1993 Order granting default against Petitioners by adding the following: "as part of the default sanction under Fed.R.Civ.P. 37(b)(2)(C), the Court conclusively finds personal jurisdiction." The trial court denied Petitioners' motion in all other respects without further comment. Thus, the issue is whether District Judge Gonzalez violated Petitioners' right to Due Process by amending his April 8, 1993 Order wherein he entered the Default. [1] As will be shown below, District Judge Gonzalez did not violate Due Process in amending his prior default order to include a finding of personal jurisdiction.

Petitioners assert the sanction entered by the Court of denying their Motion to Dismiss based on personal jurisdiction by default for discovery violations was in derogation of their Constitutional right to Due Process under the Fifth Amendment because there was not a "specific relationship between the sanction and the claim at issue in the order to provide discovery." *des Bauxites de Guinee* ,

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[1] Petitioners specifically waived all argument concerning the timing of the trial court's action below, before the Eleventh Circuit.

456 U.S. at 706.[2] Petitioners admit they provided absolutely no documents in response to Petitioners' request for production and subsequent Motion to Compel or the trial court's Order granting the Motion to Compel. While Petitioners correctly assert that there must be a specific relationship between the discovery violation and the sanction entered, their analysis of the relationship between the pending discovery to the issue of personal jurisdiction is deeply flawed.

Here, as in *des Bauxites*, one of the critical issues was whether Respondents could establish "minimum contacts" sufficient to establish personal jurisdiction over Petitioners. As a result of Petitioners' failure to provide any documents as ordered, Respondents were "unable to establish the full extent of contacts between Petitioners and" Florida. *des Bauxites*, 456 U.S. at 709. "[Petitioners'] failure to supply requested information as to contacts with [the forum state] supports 'the presumption that the refusal to produce evidence . . . is but **an admission of the want of merit in the asserted defense.**'" *des Bauxites*, 456 U.S. at 709, 102 S.Ct. 2107-2108 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 380 (1909))(emphasis supplied).

Petitioners' assertion that the documents requested only related to the facts concerning the commercial transaction involved, not the jurisdictional challenge made by Petitioners is preposterous. First, Respondents asserted personal jurisdiction below pursuant to the Florida Long Arm Statute, § 49.123, Fla. Stat., as well as "minimum contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2185 (1985). Specifically, Respondents asserted Petitioners were subject to Florida's Long Arm Statute because their co-defendant below, John Kupka, had acted as their agent in entering into the contract which was the

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[2] It is interesting to note that while Petitioners properly rely on *des Bauxites* as the standard here, when raising this issue in the trial court in their Motion for Reconsideration they relied instead on *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), a case specifically overturned by *des Bauxites*.

subject of the lawsuit, as well as their own direct contact with the forum. Petitioners denied both the agency relationship and minimum contacts. [3]

Facts relevant to personal jurisdiction were the relationship between Petitioners and John Kupka; Petitioners' travel to Florida; Petitioners' contacts with both the seller in Florida and Kupka; and, representations made by Petitioners to the Department of Transportation regarding their acquisition and ownership of Galaxy Air Lines ("GAL").

Among the specific document requests addressed in Respondents' Motion to Compel were the following:

> Request A: Any and all documents as defined above reflecting communications between you and Kupka.
>
> Request B: Any and all documents reflecting any communications between you and anyone else regarding your purchase or ownership of GAL.
>
> Request C: Any and all airline tickets, travel itineraries or other documents reflecting trips taken by you in conjunction with your purchase of GAL.
>
> Request D: Any and all personal diaries, telephone logs or any other documents memorializing any telephonic communications between you and any other parties regarding your negotiations, purchase or ownership of GAL.

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[3] Petitioners incorrectly assert the agency relationship was not pleaded and therefore not before the trial court. The Stock Purchase Agreement sought to be enforced identified the purchasers as John Kupka and assigns. And the allegations of the Complaint identified the Petitioners as the assignees of the Contract sought to be enforced, necessarily imputing an agency relationship. Moreover, the agency issue was argued at length in conjunction with Petitioners' Motion to Dismiss.

> Request H: Any and all documents reflecting any communications between yourselves and any of the officers, directors or employees of GAL, before, during, or after your ownership of GAL.
>
> Request J: Any and all documents reflecting any agreement of any sort between you and Kupka.
>
> Request K: Any and all documents reflecting any agreement between you and any person regarding the purchase of GAL.

The Petition goes paragraph by paragraph through each of these and other document requests included in the Motion to Compel Production of Documents. Petitioners ask this Court to grant its Writ of Certiorari because the word "jurisdiction" cannot be found anywhere in the entire document, nor the words "contacts" or "minimum contacts" or anything relating to the pending jurisdictional challenge. Of course, the inclusion of such "magic words" is not necessary to support the trial court's entry of the sanction as a result of Petitioners' refusal to comply with the Order granting Respondents' Motion to Compel. Moreover, a contrary finding would undermine trial judges' exercise of discretion and significantly expand the application of *des Bauxites* to unnecessarily alter pleading requirements in Federal cases.

As stated, Personal Jurisdiction as to Petitioners relied on the existence of an agency relationship between John Kupka and Petitioners and whether Petitioners had sufficient minimum contacts with the Southern District of Florida. Such factual issues would be established by reviewing the relationship between and among the parties as well as Petitioners' communications to Florida, their trips to Florida, their direct contact with others involving the transaction which occurred in Florida and any statement made to others, including the Department of Transportation, regarding the purchase of GAL. Virtually all of the discovery referenced above would provide Respondents with documents dispositive as to the issue of personal jurisdiction.

Moreover, Petitioners' efforts to expand the scope of this Court's inquiry into initial pleadings, Respondents' Motion to Compel Discovery or the District Court's prior Order regarding Respondents' Motion for Clarification, which initially brought this matter to the trial court's attention, is inappropriate. Here, Petitioners were party to the action. They submitted that issue to the Court by filing a Motion to Dismiss based on personal jurisdiction. *Shawmut Boston International Banking Corp. v. Duque-Pena*, 767 F.2d 1504, 1507 (11th Cir. 1985). District Judge Gonzalez acted appropriately and well within his discretion. Without the information sought in Respondents' Motion to Compel, establishing sufficient facts to overcome Petitioners' Motion to Dismiss on the basis of personal jurisdiction was impossible. Moreover, Petitioners' own refusal to comply with their obligations as a party to the litigation made it so.

Numerous additional facts were also known to the court at the time of the entry of the default, further supporting the conclusion that the trial court did not violate Due Process and was "just" in defaulting the Petitioners as to personal jurisdiction. The trial court's earlier Order entered in May 1990 specifically cautioned the Petitioners concerning the necessity that they be ready to provide discovery. At that time, a stay had been issued in the case. The court reiterated its intention to allow Petitioners' attorneys to withdraw and indicated that upon the lifting of the stay the Petitioners would be required to produce documents requested and addressed in the Motion to Compel and appear for deposition, whether represented by counsel or proceeding *pro se*. Again, the trial court required this Order be forwarded directly to the Petitioners by their attorneys and the record reflects it was, in fact, delivered to Petitioners.

After the lifting of that stay and another interim stay, in July 1992, Respondents re-noticed the depositions of the Petitioners. They never appeared. Over six months later, in February 1993, Respondents filed their first Motion for Default citing both the Petitioners' failure to appear for deposition as well as pointing out to the court that none of the addresses provided to the court by the Petitioners' prior

counsel or the United States Post Office were any longer valid. Their knowing abandonment of the case was apparent.

The Order appealed specifically references *Shawmut Boston International Banking Corp. v. Duque-Pena*, 767 F.2d 1504 (11th Cir. 1985). *Duque-Pena* stands for the proposition that a discovery sanction establishing jurisdiction is appropriate when a party files a motion to dismiss on grounds of personal jurisdiction and subsequently abandons their case. *Id.* at 1507. Petitioners had forsaken both this case and their counsel, prior to the trial court's granting a default. Moreover, the trial court did not abuse its discretion based on the information available to it at the time it entered its Order.

Clearly, the trial court did not violate Due Process in finding personal jurisdiction as a default sanction against Petitioners in this case. The trial court had substantial and significant facts available to support the default as to personal jurisdiction as a "just" action. Moreover, the court's default of Petitioners on the issue of personal jurisdiction did not, in any way, "offend 'traditional notions of fair play and substantial justice.'" *des Bauxites*, 456 U.S. at 703 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945)). "The district court could not possibly have deprived [Petitioners] of what [they] had long since abandoned. Therefore, [Petitioners] cannot now exert a *Bauxites* due process claim as a matter of law." *Duque-Pena*, 767 F.2d at 1507.

Contrary to the assertion in the Petition, the Tsuis did not follow the path set out in *des Bauxites* and simply "ignore the judicial proceedings," and then challenge the enforcement of the result of those proceeding elsewhere. *des Bauxites*, 456 U.S. at 706. Here, they appeared and raised the issue of personal jurisdiction, thereby submitting the issue to the trial court for determination. They then refused to provide any discovery or appear for deposition, denying the Respondents the proof necessary to establish personal jurisdiction and knowingly abandoned the case. This created a clear presumption of personal jurisdiction and any

challenge to that presumption was waived by their failure to act. *Id.*

Similarly, the discovery failure here was total, not "general" as characterized by Petitioners. The fact that Petitioners' discovery failure was total in scope does not lessen its applicability to the jurisdictional issue before the trial court. The necessary nexus between the evidence sought and the pending jurisdictional challenge was clear to the trial court and to the Eleventh Circuit as well. The sanction of the trial court was appropriate in this case and consistent with the requirements of Due Process.

The Eleventh Circuit's Per Curiam Affirmance Without Opinion Did Not Create a Conflict Nor Does It Present an "Important Question of Federal Law."

Petitioners have identified no conflict in the Circuit Courts of Appeal that warrants this Court's granting the requested Petition for Writ of Certiorari in this matter. In addition, although the Fifth Amendment is quoted in the initial page of the Petition and Due Process is referenced throughout their petition, no "Important Question of Federal Law" is actually presented therein.

CONCLUSION

The Petitioners boldly ask this Court grant Certiorari to review the unwritten opinion of the Eleventh Circuit. The record here clearly supports the actions of the trial court in finding personal jurisdiction by default and the Eleventh Circuit's *per curiam* affirmance of that ruling. There was no violation of Due Process. Ironically, after so cavalierly abandoning the judicial process in the trial court over ten years ago, the Petitioners do not hesitate to use the appellate process to further delay Respondents' proper efforts to execute the judgment entered against Petitioners on August 31, 1993. The instant Petition is no more than the last gasp in Petitioners' continuing efforts to use the judicial process to delay the inevitable.

Respondents, Marika Tolz, as Trustee for the Bankruptcy Estate of Phillip E. Sheridan, and Cardinal Corporation, pray this Honorable Court deny the Petition for a Writ of Certiorari of William T. Tsui and Tammy Lu Tsui.

Respectfully submitted,

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